IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.639 OF 2005
CONNECTED WITH
COMPANY APPLICATION NO.432 OF 2005

In the matter of the Companies Act, 1956 :

And

In the matter of Section 391 to 394 of the Companies Act, 1956 ;

And

In the matter of CHEMIDYE MANUFACTURING COMPANY PVT.LTD.

And

In the matter of scheme of Amalagamation of Chemidye Manufacturing Company Pvt. Ltd. with Thirumalai Chemicals Ltd.

CHEMIDYE MANUFACTURING COMPANY PVT.LTD. ..Petititioner

WITH

COMPANY PETITION NO.640 OF 2005
CONNECTED WITH
COMPANY APPLICATION NO.433 OF 2005

In the matter of the Companies Act, 1956 :

And

In the matter of Section 391 to 394 of the Companies Act, 1956 ;

And

In the matter of THIRUMALAI CHEMICALS LTD.

And

In the matter of scheme of Amalagamation of Chemidye Manufacturing Company Pvt. Ltd. with Thirumalai Chemicals Ltd.

Thirumalai Chemicals Ltd. ....Petitioner

Mr.Virag V. Tulzapurkar with Ms.Priya S. Dwarkadas i/b Wadia Gandhy & Co. for the Petitioners. Mr.C.J. Joy with Mr.R.C. Master with Mr.M.M. Goswami i/b T.C. Kaushik for Regional Director, Department of Company Affairs Maharashtra, Mumbai. Ms.K.V. Gautam, Deputy Official Liquidator present. Mr.Dinesh V.Lakhani - Objectionist present.

CORAM : S.J. VAZIFDAR, J.
DATED : 31ST JANUARY, 2006.

ORAL JUDGMENT :-

1. Company Petition No.639 of 2005 and Company Petition No.640 of 2005 have been filed by the transferor and transferee companies respectively seeking the sanction of a scheme of amalgamation under Sections 391 to 394 of the Companies Act, 1956.

2. The only objection to the scheme has been taken by one Dinesh V. Lakhani, who has intervened in Company Petition No.640 of 2005. He holds 833 shares i.e. 0.008% of the shares in the transferee company.

3. The authorised capital of the transferor company is Rs.1,00,00,000/- divided into 1,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid up of the transferor company is Rs.72,00,000/- divided into 72,000 equity shares of Rs.100/- each fully paid up including 44,400 equity shares fully paid up by way of bonus shares by capitalising the general reserve.

. The authorised capital of the transferee company is Rs.25,00,00,000/- divided into 1,50,00,000 equity shares of Rs.10/- each and 1,00,00,000 unclassified shares of Rs.10/- each. The issued capital of the transferee company is Rs.9,96,38,120/- divided into 99,63,812 equity shares of Rs.10/- each. The subscribed capital of the transferee company is Rs.9,95,98,120/- divided into 99,59,812 equity shares of Rs.10/- each subscribed and fully paid up. An amount of Rs.22,500/- is paid up on forfeited shares of the transferee company. Thus the aggregate issued, subscribed and paid up capital of the transferee company is Rs.9,96,20,620/-

4. One of the objects of the transferee company is to manufacture, process, import, export, buy, sell,

distribute and/or otherwise deal inter-alia in various chemicals, pharmaceuticals, intermediates, drugs and medicines and all by-products thereof. The main objects of the transferor company include similar activities as is evident from the Memorandum of Association of both the companies. The transferor and transferee companies carry on similar businesses. It was therefore felt that the proposed scheme of amalgamation would be advantageous to both the companies, their shareholders and creditors for various obvious reasons including optimum utilization of resources by cutting down voluminous administrative work. The amalgamation would also reduced duplication of various activities of the two companies and stream line the same. As there was no dispute regarding the benefits in this regard, it is not necessary to elaborate on the same.

5. The board of directors of the transferor and transferee companies approved the scheme of amalgamation on 3.6.2005 and 6.6.2005 respectively.

6. The scheme contains the usual clauses regarding the transfer of the assets and liabilities of the transferor company to and in favour of the transferee company. It also contains usual provisions

regarding the legal proceedings by or against the transferor company being continued and enforced against the transferee company after the effective date. The only provision in respect of which the intervenor has raised a dispute is the one pertaining to the swap ratio contained in clause 12, the relevant part whereof reads as under :-

> **"12. ISSUE OF SHARES BY TRANSFEREE COMPANY :**
>
> (a). Upon the Scheme becoming effective, in consideration of and vesting in of the assets and liabilities of the Transferor Company as specified in clauses 3 and 4 above, in the Transferee Company as per the provisions of the Scheme, (i) the shares held by the Transferee Company in the Transferor Company shall be cancelled and (ii) simultaneously with such cancellation, the Transferee Company shall, without any further act, obligation or deed, issue and allot at Mumbai, 5 (five) equity shares of Rs.10/- each of the Transferee Company, credited as fully paid up to the shareholders (other than the transferee Company) of Transferor Company holding equity shares of the Transferor Company whose names are recorded in the register of members of the Transferor Company as on the Effective Date or as on such other date as may be fixed by the Board of Directors of the Transferee Company, for 1 (one) equity share of Rs.100/- each of the Transferor Company held by him/her. Although the Transferor Company also holds certain shares in the Transferee Company, it is agreed that the same shall be sold in an open market before the Effective Date."
>
> (e) For the purpose as aforesaid, the Transferee Company shall, if and to the extent required, apply for and obtain the consent of the Securities Exchange Board of India, the National Stock Exchange, the Stock Exchange, Bombay the Reserve Bank of India

> and other concerned authorities, for the issue and allotment by the Transferee Company to the respective members of the Transferor Companies, of the Equity shares in the said share capital of the Transferee Company in the ratio aforesaid."

7. Company Application Nos.432 of 2005 and 433 of 2005 were filed by the transferor and transferee companies respectively seeking usual directions inter-alia regarding holding of the requisite meetings inter-alia of the equity shareholders. By separate orders both dated 15.7.2005 in each of the Company Applications, directions were passed regarding convening and holding of the meetings of the equity shareholders. As far as the transferor company is concerned the holding of the meeting of the equity shareholders was dispensed with in view of the consent given by all the equity shareholders to the scheme. Convening and holding of the meetings of the secured and unsecured creditors was dispensed with on certain terms and conditions. For instance the companies were ordered to give notice of the hearing of the Petition to the creditors and/or to obtain their consent before the hearing of the Petition. Directions were also issued for publication of notices. The order in Company Application No.433 of 2005 also required the notice convening the meeting, the scheme of amalgamation, the statement required to be signed

under Section 393 of the Companies Act, 1956 and a prescribed proxy form to be posted to each of the equity shareholders at least twenty one days before the meeting. The said order gave directions regarding the content of the public notice including that the same should specify that the aforesaid documents can be obtained free of charge at the registered office of the transferee company.

8. There is no dispute that the meetings were held in accordance with the aforesaid orders. Nor is there any allegation that the procedures prescribed by the Companies Act have been violated save and except in respect of the objections of the intervenor which I shall deal with later. As far as the transferor company is concerned, all the shareholders have given their consent to the scheme of amalgamation. The State Bank of India is the only secured creditor of the transferor company. The State Bank of India has been given notice. The State Bank of India has not objected to the scheme so far as the transferor company is concerned. The major unsecured creditor of the transferor company is the transferee company. The dues of the transferee company are to the extent of 87.85% of the total unsecured dues. The balance 12.15% of the unsecured creditors who were issued

notices have not objected to the scheme as far as the transferor company is concerned. The transferor company has accordingly filed the present petition.

9. The meeting of the equity shareholders of the transferee company was held in accordance with the said order dated 29.8.2005. The Chairman of the meeting has filed his report dated 5th September, 2005. He has annexed all the necessary documents including the details of the members/proxy who attended the meeting and votes casts in favour of or against the scheme as well as the votes declared as invalid. To the affidavit is also annexed the minutes of the meetings. The result of the meeting as tabulated in the minutes is as under :-

"After receiving the scrutinizes' report and perusing the same, the Chairman read out the number of votes cast in favour of the Resolution, number of votes cast against the resolution and votes considered invalid as under :

	Nos.	No.of Votes (Shares)
Total Number of Ballot Papers	62	45,65,591
In Favour of the Resolution	51	45,64,531
Against the Resolution	6	340
Invalid ballot papers	5	720

Thus the aforesaid special resolution was declared

passed by the Chairman of the Meeting by an overwhelming majority of about 89.47% (in terms of number of shareholders casting valid votes) and 99.99% (in terms of value of valid votes) of the members present and voting."

10. Thereafter the Company filed the present petition on 12th September, 2005. By an order dated 3rd October, 2005, usual directions were issued by this Court for advertisements to be published and notice to be served on the authorities and fixed deposit holders.

11. The Official Liquidator has filed his report dated 7th October, 2005 in which he has inter-alia stated that the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members or to the public interest.

12. The Regional Director has filed his affidavit dated 8th December, 2005 in both the company applications. The Regional Director has stated that the scheme is not prejudicial to the interests of the creditors and shareholders. The Regional Director however submitted that the company be directed to furnish the latest final position before this Court. Along with its affidavit dated 14th September, 2005 the Company annexed the copies of the annual report of

the transferee company for the year 2004-2005 and unaudited final statement for the second quarter of the financial year 2005-2006 ending on 30th September, 2005. The Regional Director has thereafter not raised any objection to the scheme.

13. To complete the narration of facts, it is necessary at this stage only to mention that by an order dated 13.1.2006, I had recorded the statement of Mr.Virag V. Tulzapurkar, the leaned counsel appearing on behalf of the Petitioners, that the Company agreed to give inspection of various documents with a view not to leave any room for grievance on the part of the intervenor. Pursuant thereto, the Company filed an affidavit dated 16.1.2006. I shall refer to the same in greater detail while dealing with one of the contentions raised by the intervenor.

14. The intervenor has raised various objections. The first objection is that the Petition is not maintainable as the transferee company has violated the provisions of Clauses 24-f, 24-g and 24-h of the Listing Agreement entered into with the Bombay Stock Exchange (BSE), which read as under :-

> "24(f). The company agrees that it shall file any scheme/petition

proposed to be filed before any Court or Tribunal under sections 391, 394 and 101 of the Companies Act, 1956, with the stock exchange,for approval, at least a month before it is presented to the Court or Tribunal.

(g). The company agrees to ensure that any scheme of arrangement / amalgamation / merger / reconstruction / reduction of capital, etc.,to be presented to any Court or Tribunal does not in any way violate, override or circumscribe the provisions of securities laws or the stock exchange requirements.

Explanation : For the purpose of this sub-clause, 'securities laws' mean the SEBI Act, 1992, the Securities Contracts (Regulation) Act, 1956, the Depositories Act, 1996 and the provisions of the Companies Act, 1956 which are administered by SEBI under section 55A thereof, the rules, regulations, guidelines etc. made under these Acts and the Listing Agreement.

(h). The company agrees that in the explanatory statement forwarded by it to the shareholders u/s 393 or accompanying a proposed resolution to be passed u/s 100 of the Companies Act, it shall disclose the pre and post-arrangement or amalgamation (expected) capital structure and shareholding pattern."

. The objection is that the transferee company failed to disclose the pre and post-arrangement or amalgamation (expected) capital structure and shareholding pattern in the explanatory statement

under section 393 of the Companies Act forwarded to the shareholders.

15. Admittedly the explanatory statement under section 393 of the Companies Act did not disclose the said particulars. Three questions arises in this regard. Firstly does non-compliance with the aforesaid provisions of the Listing Agreement render a petition for amalgamation under Sections 391 and 394 of the Companies Act not maintainable. Secondly what is the scope of the expression "shareholding pattern" in clause 24(h) of the Listing Agreement. Lastly is substantial compliance with the said provisions sufficient.

16. As I shall presently demonstrate it certainly cannot be contended that there was any mala-fide intention on the part of the transferee company in the alleged non-disclosure of the pre and post-arrangement capital structure and shareholding pattern in the explanatory statement under section 393 of the Companies Act. The intervenor however contended that irrespective of the same the provisions of clause 24-h are mandatory and contended that the non-compliance with the same entailed a dismissal of the Petition under sections 391 and 394 of the Companies Act.

17. The submission is not well founded. The Listing Agreement is entered into in exercise of the powers under section 21 of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as the SCR Act) which reads as under :-

> **"(Conditions for listing.**
>
> 21. Where securities are listed on the application of any person in any recognised stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.)"

18. The preamble to the Listing Agreement between the transferee company and the BSE resites the fact that the company had filed with the BSE an application for listing its securities and that it is a requirement of the BSE that there must be filed with the application an agreement in terms appearing thereto to qualify for the admission and continuance of the said securities upon the list of the exchange. It is only if the Applicant agrees to abide by the terms and conditions of the Listing Agreement that the exchange would agree to admit the applicant upon its list. Thus far it is clear that the terms and conditions of the Listing Agreement are requirements of the BSE.

19. There is nothing either in the Listing Agreement or in the SCR Act which indicates that non-compliance of the terms and conditions of the Listing Agreement would bar a company from making an application under sections 391 and 394 of the Companies Act for merger or would entail an automatic dismissal of such a Petition. Sections 23 and 24 of the SCR Act provide for penalties. These provisions also do not contain a bar of the nature suggested by the intervenor.

20. Nor is there any such provision in the Companies Act. Further so far as the provisions of Sections 391 and 394 relating to amalgamations are concerned the Companies Act does not distinguish before listed and unlisted Companies. Listing has its own advantages for a company. The SCR Act does not however make listing compulsory for companies. If the legislature intended treating listed and unlisted companies differently for the purposes of Sections 391 and 394 it would have provided the same either in the Companies Act or in the SCR Act or by way of some other law. No such provision has been brought to my notice. This is a further reason negating the intervenor’s contention.

21. The consequence of non-compliance with any of the provisions of the Listing Agreement would entail action by the relevant exchange under the provision of the Listing Agreement and SCR Act. For instance, the BSE may initiate action against a defaulting member including by delisting the member. Such non-compliance does not ipso-facto entail consequences under the Companies Act of the nature submitted by the Intervenor.

22. Thus non-compliance with the provisions of Clauses 24(f), (g) and (h) of the Listing Agreement does not by itself bar a company from seeking sanction of a scheme of amalgamation under Sections 391 to 394 of the Companies Act. Nor does it entail an automatic dismissal of such a Petition.

23. In a given case, it may be possible to contend that such non-compliance with the provisions of clause 24 of the Listing Agreement has resulted in prejudice to the concerned parties. In such circumstances, it would be open to the Company Court to take the same into consideration while deciding whether or not to sanction a scheme for amalgamation. That however is different from saying that the Company Court is for that reason bound to dismiss the Petition

for amalgamation.

24. In the present case, in fact no prejudice has been caused to any of the parties. The only person, who has objected to the scheme is the intervenor. He certainly has not been prejudiced in any manner as I shall presently demonstrate. It is important to note that it was not even his case that he was actually prejudiced in any manner by such non-disclosure. He fairly conceded that his objection is based only on a question of law.

25. That there was no intention on the part of either of the companies to conceal or withhold any information is clear from various factors.

26. The Company has through-out and repeatedly disclosed all the material particulars in respect of the pre and post-arrangement capital structure and shareholding pattern including to the BSE and the National Stock Exchange with whom the shares of the transferee company are listed. If there was any intention on the part of the transferee company to withhold any information, the same would never have been done.

27. It is pertinent to note that the Annual General Meeting as well as the meeting convened by the Court in respect of the scheme were held on the same day i.e. on 29.8.2005. The meeting regarding the scheme was convened at 2.30 p.m. and the Annual General Meeting was convened at 4.00 p.m. The transferee company had sent to the shareholders the notice convening the meeting together with the explanatory statement under section 393 of the Companies Act and the scheme of amalgamation. It is important further to note that in the same envelope the transferee company also forwarded the annual report and the notice of the Annual General Meeting. Paragraph 11 of the scheme disclosed the authorized as well as the issued, subscribed and paid up capital of the transferor and the transferee companies. Admittedly the transferor company is a part of the group of the transferee company. Admittedly the shares of the transferor company are owned by the promoters/their relatives/directors of the transferee company. Further the scheme also indicates the names of the directors of the transferor and the transferee companies interested in the scheme. It is true that this by itself does not amount to strict compliance with the provisions of clause 24-h. It is however a relevant factor while considering whether there was

any intention on the part of the company to withhold or suppress any information.

28. The correspondence between the transferee company, the BSE and the NSE is extremely relevant in this regard. By identical letters both dated 7th June, 2005 addressed to the BSE and the NSE, the company submitted the scheme of amalgamation under clause 24(f) of the Listing Agreement. Annexed to the letters is a table which gives the pre-amalgamation and post-amalgamation position regarding holding of the shares of the transferee company by the promoters, Indian and Foreign and non-promoters holding including of mutual funds and UTI and banks, financial institutions/insurance companies (Central/State Government Institution, Non-government institutions) The statement also contains the said details in respect of others private corporate bodies, Indian public and NRIs/OCBs (Overseas Corporate Bodies). By a further letter dated 14th June, 2005 addressed to the BSE, the pre-amalgamation shareholding pattern of the transferor company was also forwarded. By that letter, the shareholding pattern of the transferee company pre and post-amalgamation was also furnished. The details of the shareholders holding more than 0.50% of the holdings in both the companies was

enclosed. In addition thereto the company made the following disclosure in paragraph 8 :-

> "8. The details of Directorship of the Transferee Company is enclosed as Directorships of the Transferee Company.
>
> Since the management and ownership of the Transferor Company vests with the same persons/group who also have management control over the Transferee Company, the management control over the Transferee Company will not just continue but also marginally increase by about 2.72% of the expanded Capital of the Transferee Company by the issue of 2,79,000 Shares to the Shareholders of the Transferor Company."

The aforesaid details were also forwarded to the NSE by the transferee company's letter dated 14th June,2005.

29. Thereafter the NSE and the BSE by their letters dated 17.6.2005 and 23.6.2005 respectively conveyed their no objection under section 24(f) of the Listing Agreement.

30. Pausing here it must be noted that both the NSE and the BSE stated that their no objection was for the limited reference to those matters having a bearing on listing / delisting / continuous listing

requirements within the provisions of the Listing Agreement so as to enable the transferee company to file the scheme with this Court. It is important to note that both the exchanges have expressly stated that they considered the transferee company as having complied with all the provisions of the Listing Agreement. The letters/orders have not been challenged and they are in force.

31. It is not necessary therefore to consider Mr.Tulzapurkar's additional submission of law that substantial compliance with the provisions of the listing agreement is sufficient.

32. I must however add that if substantial compliance with the provisions of clause 24 of the Listing Agreement is considered sufficient the Company has more than satisfactorily met the test.

33. While considering the intention and bona-fides of the company, it is also relevant to read the notice convening the Annual General Meeting which, as stated above, was also forwarded under cover of the same letter forwarding the scheme and explanatory statement under section 393 of the Companies Act. The notice convening the Annual General Meeting contained

an explanatory statement under section 173 (2) of the Companies Act. The Director's report expressly states that the transferor company is a group company and has also been a closely held company. The same also discloses that the transferee company's investment of 16,200 shares of the transferor company will get cancelled and the shareholding of the transferee company will increase nominally by about 2,79,000 by issue of shares to the shareholders of the transferor company.

34. Moreover the transferee company by its letter dated 6th June, 2005 addressed to the BSE and the NSE stated that its board of directors had approved the scheme of amalgamation with the transferor company : "owned by the Promoters and their relatives/Directors" subject to approvals. The BSE in turn stated the above facts on its web-site. Advertisements were issued on 6th June, 2005 in Economics Times and Maharashtra Times (Marathi). The aforesaid facts were disclosed in both the said advertisements.

35. What is even more important to note is that in the aforesaid documents, advertisements and correspondence, the transferee company has plainly and openly disclosed not merely the number of shares but

the fact that the transferor company is part of the group of the transferee company and that the shares of the transferor company were held by the promoters of the transferee and their representatives/directors.

36. The above facts do not indicate any mala-fide intention on the part of the Companies to conceal any material information. They in fact establish the bona-fides of the Company in this regard. The omission, if any, was inadvertent and in fact caused no prejudice to any one. Finally it is important to note that the entire information was available to the Court and all the parties. There was nothing to indicate that the facts which ought to have been disclosed pursuant to Clause 24, in any way indicate that the scheme ought not to be sanctioned.

37. The expression "shareholding pattern" in clause 24(h) of the Listing Agreement does not include within its ambit every detail regarding every shareholder or even the name of every shareholder in every case. This would depend upon the facts and circumstances of each case. In the present case, nothing has been indicated to establish that for the proper disclosure the name of every shareholder and the details regarding the shareholding of every

shareholder ought to have been furnished. For instance, the disclosure contained in the annexures to the letter dated 7.6.2005 referred to earlier which indicates the pre and post-amalgamation shareholding pattern is sufficient. It indicates the shareholding of the groups of shareholders as well as the percentage held by each group. In the facts of this case the disclosure was sufficient.

38. The intervenor, then contended that the Chairman had wrongly declared as invalid the votes casts by him in respect of 566 shares under three folios. It is not necessary to ascertain whether the contention is correct on merits. Even assuming that the intervenor's contention in this regard is correct, it would make no difference to the ultimate result. The result would ultimately alter by only a fraction of a percentage. The resolution was passed by the shareholders to the extent of 89.47 in number and 99.99% in value.

39. The intervenor also contended that the Chairman ought to have appointed some other persons as scrutineers in view of the objection to the scrutineers appointed by him. The report of the Chairman indicates that there was no objection to the

scrutineers appointed by the Chairman per-se. There are no allegations of mala-fides against the scrutineers. The objection at the meeting was of one Ms.Masceranhas who "felt she was more suited to be the scrutinizer and she found support from Mr.Lakhani (Intervenor)". The suitability of the scrutineers was a matter to be decided by the Chairman. The Chairman found that all other shareholders accepted one J.P. Maheshwari and A.R. Chary as scrutineers. The exercise of discretion by the Chairman cannot be faulted in this regard.

40. The intervenor then submitted that the ballot box had no locking facility. The objection is without any substance. There is no suggestion that the ballot box was tampered with. The ballot box in fact was sealed. There is only a bare allegation that the tampered old cardboard box was used as ballot box with no provisions for locking facility. There is no evidence indicating any tampering. This is despite the fact that inspection of the record had been taken.

41. The intervenor submitted that the valuation report of the statutory auditors ought not to have been considered and that an independent person ought to have done the valuation. It was not contended

before me that the statutory auditors had acted mala-fide or with oblique motive. There is no bar in law to a statutory auditor carrying out valuation. There is no presumption that a statutory auditor is not an independent person. Indeed the nature of their appointment under the Companies Act would indicate a presumption to the contrary.

42. The intervenor then submitted that though it is true that 99.99% in value had approved the scheme of amalgamation, the requisite majority of number of shareholders had not been obtained. He submitted that a judgment of the Division Bench of this Court in *Dinesh Vrajlal Lakhani vs. Parke Davis (India) Ltd*. was incorrect and that he desired to challenge the same. The Division Bench held as under :-

> "33. At a meeting convened on the directions of the Court under Section 391 to consider a compromise or arrangement, a poll has to be taken to determine the outcome of the meeting. The outcome of the poll is not determined by a head count of the shareholders who vote. Contrary to what the Appellant asserts, Section 391(2) does not adopt the principle of one person, one vote nor does it warrant a recourse to a head count for determining whether a majority as mandated exists. It obviously does not, in so far as the requirement relating to three-fourths in value of the members or creditors is

> concerned. Similarly, in so far as the question of majority in number is concerned, it is not possible to accept the submission of the appellant that the words "present and voting either in person or .. by proxy" incorporate the principle that for computing the majority in number of the creditors or members present and voting, a head count of the members or creditors must be the basis of computing the majority. That is not the principle adopted by the Companies Act. There is also intrinsic material in the regulations specified in Table-A to hold that this is not so. The articles of association of the Company place the matter beyond doubt."

43. There is no dispute that if this judgment is correct there was the requisite majority. The judgment is however binding on me. It is not permissible for me to question the judgment. It is not necessary therefore to ascertain whether on a mere head-count the requisite majority had been obtained. The contention is therefore rejected.

44. The intervenor suggested that there has been double voting by some shareholders. The intervenor further stated that he desired to inspect certain records of the Company. The matter was part heard on 13.1.2006. Though the matter was part heard, Mr.Tulzapurkar stated that with a view not to leave any room for grievance, he was willing to give

inspection of the record requested for by the intervenor. Each of the documents of which inspection was sought by the intervenor was specified in the order dated 13.1.2006. The company also agreed to state the names of all the joint holders of the said shares and to specify the folio numbers of the said shares/DPIT and client ID in respect of the said shares. The company has given inspection and filed an affidavit. No arguments were addressed based on the said inspection. There is nothing to suggest that there has been any double voting in the said meeting.

45. The intervenor also challenged the valuation. The same is provided in clause 12 of the scheme of amalgamation reproduced earlier. Before me, the intervenor stated that the valuation of the transferor and the transferee companies were carried out on different basis. In respect of the transferor company, the net assets value basis was adopted. Whereas in respect of the transferee company the book value was determined. The intervenor submitted that adopting different methods of valuation with respect to the two companies was incorrect.

46. Apart from reading parts of the valuation report, there was no cogent challenge to the valuation

report itself. Nor was any reason specified at the hearing as to why the swap ratio was unfair or uncertain. The valuation report was prepared by Contractor, Nayak & Kishnadwala, Chartered Accountants. The valuers have valued the shares of the transferee company on the basis of book value per share, weighted average of quoted price at the NSE for the six months ended 31st May, 2005 and by capitalizing the yield for 2004-05. The capitalization of the yield is done at 14%, which is arrived at by considering the average return on capital employed obtained by the transferee company for 2003-04 and 2004-05. Accordingly the shares of the transferee company were valued at Rs.106.15 ps.

47. In respect of the transferor company, the Chartered Accountants observed that it was a closely held company located next to the transferee company and operating on land leased from the transferee company. It is further observed that the valuation of the shares of the transferor company were done not merely on net assets value but also by considering the yield based on EPS of future maintainable profits for the five years 2005-06 to 2009-10 and the discounted cash flow for the said five years. Accordingly the shares of the transferor company were valued at

Rs.533.72. The exchange ratio of 1:5 was thus arrived at.

48. There is nothing to suggest that the method of the valuation was absurd or irrational. In this regard, it is pertinent to note the observations of the Supreme Court in the case of *Hindustan Lever Employees' Union vs. Hindustan Lever Limited & Ors., 1995 Supplementary (1) SCC 499.*

> "3. But what was lost sight of was that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair to the shareholders of the company which was being merged. The Court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body.....
>
> . But since admittedly more than 95% of the shareholders who are the best judges of their interest and are better conversant with

> market trend agreed to the valuation determined it could not be interfered by courts as, "certainly" it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme. We do not think that the internal management, business activity or institutional operation of public bodies can be subjected to inspection by the court. To do so, is incompetent and improper and, therefore, out of bounds."

49. The objections raised by the intervenor are therefore rejected.

50. In the circumstances, Company Petition No.639 of 2005 is made absolute in terms of prayers (a) to (k). The transferor Company shall pay the Official Liquidator and Regional Director costs fixed at Rs.2500/- each. Company Petition No.640 of 2005 is also made absolute in terms of prayers (a) to (k). The transferee company shall pay the Regional Director costs fixed at Rs.2500/-.

51. At the request of the intervenor, the operation of this order is stayed till 1.3.2006.

. Filing and issuance of the drawn up order is

dispensed with.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.639 OF 2005
CONNECTED WITH
COMPANY APPLICATION NO.432 OF 2005

WITH

COMPANY PETITION NO.640 OF 2005
CONNECTED WITH
COMPANY APPLICATION NO.433 OF 2005

DATE OF DECISION : 31ST JANUARY, 2006

For Approval and Signature :

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)